No. 14106

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEW WAH FOOK, as Guardian *Ad Litem* for LEW SUEY YET, Also Known as LEW THEW YUT,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the United States,

Appellee.

BRIEF FOR APPELLANT.

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Jurisdictional Statement.

Plaintiff, Lew Suey Yet, also known as Lew Thew Yut, filed his petition in the Court below, claiming to be a citizen or national of the United States, pursuant to the provisions of Section 1993, Revised Statutes of the United States. (Acts of April 14, 1802, and February 10, 1855, before amended by Act of May 24, 1934, Sec. 1, 8 U. S. C. A. 601(g).) (This Act has since been amended in 1952, but was the law applicable at the time plaintiff was born.) Such act in as far as applicable to plaintiff reads as follows:

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States,

whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Jurisdiction is conferred upon the Court below by the Act of October 14, 1940, Ch. 876, Title I, subchapter 5, Section 503, 54 Stat. 1171 (8 U. S. C. A., Sec. 903). This section in as far as it is applicable to plaintiff provides as follows:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a National of the United States. * * *."

This statute was repealed in 1952, but was the pertinent jurisdictional law in effect at the time plaintiff's complaint was filed herein.

Statement of the Case.

Plaintiff, Lew Suey Yet, also known as Lew Thew Yut, by and through his guardian, Lew Wah Fook (his alleged father) filed in the United States District Court for the Southern District of California, Central Division, a petition and amended petition seeking a declaratory judg-

ment of United States citizenship. The action was brought pursuant to the statute then in effect, to-wit: Section 503 of the Nationality Act of 1940 (8 U. S. C. A.). The appellant claims to have acquired United States citizenship at the time of his birth, in accordance with the United States Nationality Statute then in effect. The appellant claims to be the lawful blood child of Lew Wah Fook. It was conceded by the defendant-appellee at the time of trial that Lew Wah Fook, the alleged father, was and now is a citizen of the United States. [Tr. 22.]

Lew Wah Fook testified that he arrived in the United States the latter part of 1923 [Tr. 22] and made two trips to China, but returned to the United States each time. [Tr. 23.] The record discloses that, except for those trips to China, he has been a permanent resident of the United States since July of 1923. He testified that he made his first trip to China in August of 1929 and returned April 3, 1931, and that he departed on the second trip in November of 1932 and returned in May of 1935. [Tr. 23.]

Lew Wah Fook further testified that plaintiff arrived in the United States port of entry in 1951 with his two older brothers, and that the said two older brothers were admitted to United States citizenship but plaintiff-appellant herein was detained by the Immigration and Naturalization authorities [Tr. 38-39], pending a determination of his status. The Board of Special Inquiry of the Immigration and Naturalization Service held a hearing at San Pedro, California, on June 28, 1951, and determined that appellant herein was not a citizen of the United States and was not admissible to the United States as such. Thereafter the Board of Immigration Appeals

on July 1, 1952, affirmed this decision, excluding appellant from United States citizenship. Thereafter on July 10, 1952, appellant filed his petition in the Court below, by and through his guardian *ad litem,* Lew Wah Fook, to have his claim of citizenship determined by the lower Court. [Tr. 13, 14.]

The cause came to trial in the Court below without a jury. The appellant, his alleged father, Lew Wah Fook, and two witnesses testified concerning the claimed relationship of appellant to his father, Lew Wah Fook. The defendant-appellee presented no witnesses. The lower Court found for the defendant-appellee, and it is from this judgment that the appellant prosecutes this appeal.

Statement of Points.

I.

The Court erred in not declaring the plaintiff, Lew Suey Yet, also known as Lew Thew Yut, a citizen of the United States, in view of the direct testimony of witnesses which was not uncontradicted, nor were any material inconsistencies shown on cross-examination, and the complete lack of any evidence to the contrary adduced or introduced by the defendant.

Résumé of the Evidence.

Lew Wah Fook testified that he was born January 18, 1913, in Canton, Toy Shan, China, in Lung Uck Village [Tr. 21]; that on his first trip to China from the United States in 1929 he married Huie Shee Yee [Tr. 23]; that his marriage was in the same village where he was born, and was according to the Chinese marriage customs and ceremonies; that his oldest child is Lew Mon Soong, born November 9, 1930, and that his next son is Lew Mon Hing

or Hung, born December 2, 1933 [Tr. 24]; that he had a third child born September 9, 1935, named Lew Suey Yet; that the portion of the name of Yet can also be spelled Yut. [Tr. 24-25.] This latter child, of course, is the appellant herein. He also stated that a fourth child was born December 17, 1946, and that his name was Lew Mon Tang. He testified that his sons Lew Mon Soong and Lew Mon Hing have been admitted to the United States and are in Los Angeles, California, and that his third son, appellant herein, was sitting at the Council table when he, Lew Wah Fook, was testifying. [Tr. 25-26.] He testified that upon his return from his second trip to China he gave information to the Immigration and Naturalization Service that he had two male children, Lew Moon Seung and Lew Moon Hin [Tr. 29], and that his wife was seven months pregnant. [Tr. 29.]

Lew Wah Fook continued to testify that when he left China to return to the United States at the conclusion of his second trip that his older two children were in the village living with his wife, the mother of said two sons, and that he had not seen them since said second trip, until February, 1946 [Tr. 34], when he saw them in the same village and the same house that he had occupied when in China; that this visit was occasioned by a 90-day leave given him by the United States Army when he went back to the village to visit his family in China, they were living in the same house, in the same village where his family had lived when he made both the first and second trips to China. [Tr. 36.] He testified in detail about the other son at page 37 of the Transcript, and that he saw his son, plaintiff herein, for the first time when he went to the village on his United States Army 90-day leave. [Tr. 38.] He identified appellant herein

as the son he saw upon his arrival to the United States in 1951 as the same son he saw in China in 1946 when he had his Army furlough. [Tr. 39.]

Lew Mon Soon was called as a witness for appellant and testified that he was born November 19, 1930, in Lung Uck Lee, China, and arrived in the United States May 27, 1951 [Tr. 40]; that from the time of his birth he lived in the same village until going to Hong Kong, which was about a year before he left for the United States; that his brothers, Lew Mon Hing and appellant, Lew Suey Yet lived with him at all times in the village and that the three boys went to Hong Kong together [Tr. 41]; that his father was Lew Wah Fook, the man that came to Court with him, and that his mother's name was Huie Shee Yee, and that his brothers, Lew Mon Hing and Lew Suey Yet lived with the mother in their home in the village until his mother died. He identified his next brother, Lew Mon Hing as being in the witness room with him at the time of the trial, and the appellant Lew Suey Yet, as his brother, sitting at the counsel table, and that he had played with appellant since he could remember, and recalled seeing his father in the village in 1946. [Tr. 43.]

Lew Mon Hing testified as a witness for plaintiff, it being conceded by the defendant-appellee that both Lew Mon Hing and the previous witness, Lew Mon Soon were admitted to the United States as American citizens through derivative citizenship of the father, Lew Wah Fook, guardian of plaintiff herein, effective July 1, 1952. [Tr. 52-53.] He testified that he was born in Lung Ock Village, China, and that his father's name was Wah Fook and his mother's Hui Shee, and that he had an older

brother, Lew Mon Soong, who testified the day before and exchanged places with the witness in the witness room. [Tr. 53.] He identified the witness, Lew Wah Fook, as his father, and that he has a younger brother, his No. 3 brother, Thew Yet, who was sitting at the counsel table next to Mr. Brennan. [Tr. 54.] He stated that he came to the United States with his brothers, Lew Mon Soong and plaintiff, Lew Suey Yet, and that the three brothers lived together in the home village and came to Hong Kong together; that he recalls seeing his father in 1946, and that his brothers, Lew Mon Soong and Lew Suey Yet were both living in the same village at the time his father was there, and that all were part of the same household. [Tr. 56-57.]

Plaintiff, Lew Suey Yet, testified that he desired to be a permanent resident, in the Southern District of California, Central Division of the Trial Court, and that his father was Lew Wah Fook; that this was the same person who had been in Court with him in the adjacent witness room; that his mother was Huie Shee Yee; that he was born in Lung Ock Li, September 9, 1935; that he came to the United States with his two older brothers, Lew Mon Soong and Lew Mon Hing; that prior to coming to the United States he had lived in the same village with his brothers and his family prior to coming to Hong Kong, and went to Hong Kong with the same two older brothers. [Tr. 60-61.] He stated he recalled seeing his father, Lew Wah Fook, in February of 1946, when he was about eleven years of age, in the home village and that the person he knew then as his father is the same person he identified in Court, and that the two brothers he mentioned in Hong Kong and his home village

are the same two he identified in the Trial Court. [Tr. 62.]

It thus appears from the uncontradicted testimony that Lew Wah Fook, the alleged father of appellant, made a positive identification of appellant, and that this was firmly corroborated by his two sons, Lew Mon Soong and Lew Mon Hing (admittedly blood children of Lew Wah Fook), who positively identified appellant as the boy they had known and grown up with in the home village, and that they accompanied appellant to Hong Kong, contemplating entry to the United States, and came to the United States with him. It is difficult to perceive how a stronger showing could have been made that the appellant was and is the blood child of Lew Wah Fook.

Argument.

It is respectfully submitted that the Findings of Fact of the Trial Court are "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure. It therefore follows that the Court erred in pronouncing its judgment that appellant was not a national and/or citizen of the United States by reason of the uncontradicted testimony of appellant, his alleged father Lew Wah Fook, and his two brothers (admitted by the defendant-appellee to be the lawful blood children of Lew Wah Fook, guardian of appellant herein).

The particular portion of the Findings of the Trial Court which appellant claims were "clearly erroneous" appears at page 14 of the Transcript of the Record, as follows:

"VIII.

"That the credibility of the witness Lew Wah Fook, alleged father of the plaintiff herein, has been

so impeached that, as a result, the Court does not believe the testimony of the said plaintiff, the witness Lew Wah Fook, or other witnesses, and there is insufficient credible evidence to support plaintiff's claim that he is a citizen of the United States.

"IX.

"That the plaintiff herein was born in China, but that said plaintiff is not the son of Lew Wah Fook, and is not a citizen of the United States."

The extent of this Court's Appellate review of the Findings of Fact of the Trial Court is described by Rule 52(a) of the Federal Rules of Civil Procedure. The United States Supreme Court in discussing this Rule, stated in the case of *United States v. United States Gypsum Co.* (1948), 68 S. Ct. 525, 542, 333 U. S. 364, 395, 92 L. Ed. 746, reh. den. 68 S. Ct. 788, 333 U. S. 869, 92 L. Ed. 1147.

"Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

"A finding of fact is clearly erroneous if it is against the clear weight of the evidence."

Fleming v. Palmer (C. A. 1), 123 F. 2d 749, 751 (cert. den. 316 U. S. 662, 65 S. Ct. 942, 86 L. Ed. 1739).

See also:

Nee v. Main St. Bank (C. A. 8, 1949), 174 F. 2d 425 (cert. den. 70 S. Ct. 69, 338 U. S. 823);

Lassiter v. Guy F. Atkinson Co. (C. A. 9, 1949), 176 F. 2d 984;

Grace Bros. v. C. I. R. (C. A. 9, 1949), 173 F. 2d 170.

In determining whether a Trial Court's finding is clearly erroneous the Appellate Court may examine all the evidence in the record, and upon reviewing a judgment as to the facts, an Appellate Court looks first to the Trial Court's findings and then to evidence in the record to ascertain whether the findings are "clearly erroneous":

Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123 (C. C. A. 5, 1943), 137 F. 2d 176.

The interpretation of Rule 52 is discussed by Barron and Holtzoff, Federal Practice and Procedure, Vol. 2, Sec. 1135 at page 849, where they state as follows:

"Rule 52 plainly contemplates a review by the appellate court of the question whether there is substantial evidence to sustain the trial court's findings of fact. *Substantial evidence is not merely some evidence. It must be more than a mere scintilla.* It is evidence of such quality and weight as would justify a reasonable person in drawing the inference of fact made by the court." (Emphasis ours.)

See also:

State Farm Mut. Automobile Ins. Co. v. Bonacci (C. C. A. 8, 1940), 111 F. 2d 412;

Baltimore & O. R. Co. v. Postom, 177 F. 2d 53, and cases cited therein.

It thus manifestly appears that this Court, in construing the Findings of the Trial Court, may examine all of the evidence and testimony to ascertain if said Findings were "clearly erroneous."

It has been held if a judgment is against the positive, uncontradicted and unimpeached testimony there is a violation of this rule.

Foran et al. v. Comm. of Internal Revenue (C. C. A. 5), 165 F. 2d 705, 707.

> "Both under Rule 52(a) of the Rules of Civil Procedure, and well established equitable principles, we are not bound by the trial court's findings if we are of the view that they are against the great weight of the evidence."

Gutowsky v. Jones et al. (C. A. 10), 178 F. 2d 60, 65.

Unimpeached and uncontradicted testimony cannot be disregarded.

Chesapeake & Ohio Ry. Co. v. Martin, 283 U. S. 209, 216-217, 51 S. Ct. 453, 75 L. Ed. 983, 987-988;

Grace Bros. v. Commissioner of Int. Revenue (C. A. 9), 173 F. 2d 170, 174;

San Francisco Assn. for the Blind v. Industrial Aid for the Blind, Inc. (C. A. 8), 152 F. 2d 532, 536.

In *Foran et al. v. Commissioner of Internal Revenue* (C. A. 8), *supra,* wherein the only evidence before the Trial Court was the testimony of one of the parties the Appellate Court said:

> "We think the court's refusal to follow the sworn testimony is contrary to law, and requires the setting aside of its fact-finding as it would that of a jury."

Moreover, as stated by the Court of Appeals for the Second Circuit in,

> *Orvis v. Higgins,* 180 F. 2d 537, 540 (cert. den. 71 S. Ct. 37, 340 U. S. 810, 95 L. Ed. 595),
>
> "It follows that evidence sufficient to support a jury verdict or an administrative finding may not suffice to support a trial judge's finding."

We submit that in the case at bar the findings are "clearly erroneous" within the meaning of Rule 52(a), *supra,* in that they are against the clear weight of the evidence, which is all one way and which is positive, uncontradicted and unimpeached. We submit, further, that under principles laid down by this Court in many cases, a finding against appellant on this record would not withstand appellate review even if made by an administrative tribunal whose decisions are declared to be final by statute. (8 U. S. C. Sec. 153.)

In *Go Lun v. Nagle,* 22 F. 2d 246, 248, with regard to such a review this Court said:

> "We fully appreciate the narrow limits of the jurisdiction of the courts on habeas corpus proceedings to review decisions of the immigration tribunals; but 'the error of an administrative tribunal may, of course, be so flagrant as to convince a court that

a hearing had was not a fair one.' *Tisi v. Tod,* 264 U. S. 131, 44 S. Ct. 260, 68 L. Ed. 590. Such a case is presented here.

"A reading of the entire testimony of the three witnesses leaves not the slightest room for doubt that their relationship was fully established, and that the appellant is a citizen of the United States. A contrary conclusion is arbitrary and capricious and without any support in the testimony.

"In *Johnson v. Damon* (C. C. A.), 16 F. (2d) 65, the court considered discrepancies on which an excluding decision was based, more important than any disclosed by the present record and in reference to the excluding decision said 'The mind revolts against such methods of dealing with vital human rights.' That language might well be applied here."

The case of *Johnson v. Damon,* from which this Court quoted the forceful language just mentioned, involved two Chinese boys who sought entry as sons of a citizen who had died when they were infants. Their testimony was supported by that of a previously admitted brother and uncle. This appears to be an obviously weaker case than the instant appeal in that here we have the positive testimony of the alleged father and two previously admitted brothers. Despite the statutory limitations upon the power of the Court to review the administrative decision, the Court in that case was impelled to overturn that decision in the forceful language quoted by this Court in the case of *Go Lun v. Nagle,* 22 F. 2d 246, 248, *supra.*

In speaking of the rejection by administrative tribunals of uncontradicted and unimpeached testimony by the

appellant and his alleged relatives in *Gung You v. Nagle,* 34 F. 2d 848, 852, this Court said:

> "The mere hearing of witnesses by an officer is of no avail to a party, if the evidence of competent witnesses is to be entirely disregarded and findings made in the teeth of the testimony of one or a dozen such witnesses, either because of a fixed policy, to give a weight to a presumption of law far beyond the legislative intent, or because of a policy calculated to entrap the witness * * *."

In conclusion, this Court held that the rejection of the evidence of the several witnesses was purely arbitrary. See also:

Quan Toon Jung v. Bonham (C. A. 9), 119 F. 2d 915;

Wong Tsick Wye et al. v. Nagle (C. A. 9), 33 F. 2d 226.

It seems obvious that an administrative finding of fact adverse to the appellants would not withstand even the limited review afforded on habeas corpus proceedings, under the foregoing decisions and many others to the same effect. Moreover, it is plain under the authorities hereinbefore cited that the power of appellate review of findings of fact under Rule 52(a) of the Federal Rules of Civil Procedure is even broader than it is in the case of administrative findings which carry statutory finality. Consequently, we submit that the findings of the Court below are "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.

Furthermore, this Court, in considering appeals from judgments entered in judicial deportation proceedings under

former Section 282 of Title 8, United States Code, has held that uncontradicted and unimpeached testimony of witnesses in behalf of the defendant cannot be disregarded by the Trial Court.

Wong Kam Chong v. United States (C. A. 9), 111 F. 2d 707, 712;

Lee Hin v. United States (C. A. 9), 74 F. 2d 172.

We submit that the foregoing principles enunciated by this Court in reviewing administrative decisions and judgments in judicial deportation proceedings are applicable here by analogy. The scope of the appellate review under Rule 52(a) of the Federal Rules of Civil Procedure is at least as broad as in habeas corpus or judicial deportation proceedings. Here the evidence submitted by appellants to establish their citizenship is positive, uncontradicted and unimpeached. The alleged father and his two admitted sons gave testimony directly upon the issue. No contradictory or countervailing evidence has been submitted. We submit that under the well settled principles mentioned above the findings of the Court below adverse to the claim of appellants is "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.

With reference of the matter of alleged discrepancies in the testimony, it is submitted that in the main the discrepancies, if any, were on and concerned immaterial and collateral matters. The Trial Court seemed concerned about an alleged discrepancy with reference to the dates of the two older sons of Lew Wah Fook, namely, Lew Mon Soong and Lew Mon Hing, who admittedly have been admitted as sons of Lew Wah Fook. However, as pointed out by Mr. Brennan, attorney for appellant at

the time of the trial, this issue was immaterial and, at least up to that point, there had been no discrepancy as far as plaintiff-appellant is concerned. [Tr. 55.] Concerning this point the Trial Court stated:

> "The Court: No, there has been no conflict as to the plaintiff yet." [Tr. 56.]

It has been held by this Court that mere discrepancies do not necessarily discredit testimony, and that it must be understood in the light of reason on which it rests.

> *Louie Pay Hok v. Nagle* (C. C. A., Cal.), 48 F. 2d 753;
>
> *United States ex rel. Ng Lin Suey v. Day,* 49 F. 2d 471.

As a further general rule it may be stated that few easily explicable discrepancies on *collateral points* will not support a refusal to credit *strong affirmative evidence* of paternity.

> *United States ex rel. Ng Kee Wong v. Day,* 44 F. 2d 406.

In the case of *Young Len Gee v. Nagle* (C. C. A., Cal.), 53 F. 2d 448, this Court pointed out that the discrepancies in testimony were so slight that a finding that the alien was not the son of an American born Chinese was arbitrary and capricious.

Other cases that hold that discrepancies alone are not sufficient to deny citizenship:

> *Chung Vig Tin v. Nagle* (C. C. A.), 45 F. 2d 484;
>
> *Weedin v. Lee Gon,* 47 F. 2d 886;
>
> *Nagle v. Jin Suey* (C. C. A., Cal.), 41 F. 2d 522;
>
> *Johnson v. Damon, ex rel. Leung Fook Yung,* 16 F. 2d 65.

Thus, in weighing the entire evidence submitted at the time of the trial it is respectfully submitted that any alleged discrepancies were immaterial and collateral, and as such should not have been considered by the trial court.

From a close scrutiny of the entire record and the reporter's transcript it appears that the main and sole point that the Trial Court found for the defendant-appellee is that appellant is in fact a male, yet was given at his birth the name of a female. It is submitted that by reason of the logical explanation of Lew Wah Fook and the positive testimony and identification of the two older brothers that the Trial Court erroneously indulged in conjectures rather than following the undisputed testimony and evidence.

Concerning the female name of the male appellant, he testified that he was subject to ridicule because of his name and that the other little children in his village said that it was a girl's name. [Tr. 64.] Apparently the first occasion in which the female character of appellant's name arose was under cross-examination of Lew Wah Fook when he was interrogated concerning information furnished the Immigration and Naturalization Service. At the time this information was furnished he testified that he *claimed* two sons and one daughter. [Tr. 70-71.] It may be recalled from the previous testimony of Lew Wah Fook that he stated he did not return to China from the United States after his second trip (until he saw his wife and children in China in 1946 when he received a 90-day leave from the United States Army), and that he had furnished information to the Immigration and Naturalization Service on the return to the United States from this second trip that he had two male children and that his wife was seven months pregnant. Thus it is readily

apparent that Lew Wah Fook was not present when the appellant was born. He testified that he received correspondence advising him that his wife had given birth to a child, and giving him the name and date of birth. From this name *alone,* which was a girl's name, he assumed that the child was a daughter. [Tr. 74.] He amplified this testimony to the effect that no one at any time advised him that the child born and given the girl's name was, in fact, a male. It is interesting to note that the Trial Court asked of the interpreter whether a similar situation in the interpreter's knowledge had arisen, namely, that a boy was given a girl's name. The interpreter replied in the affirmative and gave an explanation. [Tr. 74.] In order to shed some light on the feelings of the Trial Court that it was actually indulging in conjecture the Court states at page 75 of the Transcript:

"It is pretty near inconceivable."

Lew Wah Fook went on to say that he did not know that appellant was in fact a boy until he returned when he was in the Army in 1946, and that this fact made him very joyous and that while he was there he demanded of his mother an explanation as to why he had not been informed of the fact that the child, in fact, was a boy. He then advised the Court that his mother was a highly superstitious woman, and that by reason of a ritual common in China concerning the length of life of children, that appellant would apparently live longer as a girl than a boy. The mother of Lew Wah Fook, therefore, arbitrarily as the head of the family, gave appellant a girl's name, and instructed all the rest of the family not to tell him that it was a boy, and to either advise Lew Wah Fook that it was a girl or to keep quiet and not tell him

that it was in fact a male. [Tr. 76.] In furtherance of his explanation as to the appellant, he stated that when he ascertained the true sex of appellant he wanted to have an immediate ceremony and change the name to a boy's name. However, his mother again insisted that by reason of the superstitions and the rituals common in China the boy would have to reach the age of 18 before such a process could be undertaken. Otherwise, "his health would be in jeopardy." [Tr. 77.]

Concerning his information as to the birth of the child on continued cross-examination, he testified that he came back to the United States in July of 1935, and two or three months thereafter received a letter advising that a child was born, and in response to a question by the Court, stated the letter did not advise him whether it was a boy or a girl, and that the child that was born in 1935 is the same child that was named Lew Suey Yet, appellant herein. [Tr. 78.] He stated that when he returned home on his Army furlough in 1946 and found that he had three sons he was astonished as he had believed the youngest one was a daughter. [Tr. 80.] In response to a question by the United States Attorney as to what explanation was given to Lew Wah Fook he again explained the superstitions existing in China and that as his mother was the head of the family she named appellant with a female name. He also stated that they did not inform him because he did not believe in the Chinese religion or spirits and was a Christian, and that if he were told he would naturally refuse to carry out the antiquated customs and would insist on a celebration because it was a boy. [Tr. 81.] This certainly corroborates the reason that his mother and family in China did not advise Lew

Wah Fook of the true fact that appellant was in fact a boy and not a girl. He also testified in response to a question in cross-examination that his mother consulted a fortune teller in addition to going through the ritual at the Chinese temple. [Tr. 81-82.]

It is respectfully submitted that the Court manifested its state of mind that it was actually indulging in conjecture rather than rendering a decision from the testimony and evidence adduced and introduced at the time of the trial in its brief summary where it stated that it could not believe that if plaintiff and appellant was in fact a boy this fact had not been called to the attention of Lew Wah Fook, the alleged father. Thus it appears that the decision for the defendant-appellee was based solely on the matter of the female name given to a male child, and the Court completely disregarded the completely logical and probable explanation of Lew Wah Fook, and the positive identification and testimony of the two older brothers that they had lived in the same house with appellant and their mother from the time they could remember in the village in China where they were all born, and the three of them went to Hong Kong and then to the United States.

It might be observed that although plaintiff-appellant had the burden of proof in the suit below, this type of burden does not raise a presumption that the plaintiff or his witnesses will commit perjury.

Lee Mon Hong v. McGranery (1953), 110 Fed. Supp. 682.

The testimony above set forth of the appellant and his father clearly expresses a father and son relationship. It was stated by Judge Wilbur in the case of *Gung You v. Nagle,* 34 F. 2d 848, at page 852:

> "Relationship is now usually proven by physical facts, and never is where the mother does not testify, but by pedigree, reputation in the family and by the conduct of the parties, including the manner in which they live. The fact that a small child lives in the home of its alleged parents and that they maintain toward each other the obligation involved in the relationship is evidence favorable to the issue, and evidence that they did not live together and did not conduct themselves as parent and child is evidence to the contrary. Such evidence is not collateral evidence, it is direct and material evidence on the issue."

The testimony of the appellant and his father standing alone would be sufficient to establish a *prima facie* showing of the claimed relationship. This pedigree evidence, if uncontradicted by other evidence, is sufficient to sustain the issue it covers. Such testimony is entitled to consideration in arriving at a decision in this matter. This Court has previously stated:

> "He took the stand and testified to his own belief concerning his place of birth. This evidence of course, was hearsay, but nevertheless, it is the type of hearsay which is permitted. U. S. v. Wong Gong (C. C. A.), 70 F. 2d 107."
>
> *Lee Hin v. United States,* 74 F. 2d 172, 173.

Also see:

> *Ex parte Delaney,* 72 Fed. Supp. 312, affd. 170 F. 2d 239.

The same view was expressed by this Court in *United States v. Wong Gong,* 70 F. 2d 107:

> "The testimony of the witness as to the date and place of his birth is, of course, hearsay, but it is competent. *Wigmore on Evidence,* p. 1501; *United States v. Tod* (C. C. A.), 296 F. 345."

The Court of Appeals for the First Circuit stated that in the absence of official records, statements of the parents concerning their children should be considered as reliable.

O'Connell v. Ward, 126 F. 2d 615, 620.

The evidence offered by appellant to establish his claim to United States citizenship cannot be wholly disregarded without sufficient reasons.

See:

Wong Kam Chong v. United States, 111 F. 2d 707, 712;

Lau Hu Yuen v. United States (9 Cir.), 85 F. 2d 327.

It was stated by the Court of Appeals for the First Circuit in *Ward v. Flynn,* 74 F. 2d 145, at page 146:

> "* * * to reject sworn, consistent, unimpeached and uncontradicted testimony, there must be a real reason which would be regarded as adequate by fair minded persons."

As appellant contends that he is a citizen and national of the United States and Statutes of the United States in effect at the time of his birth specifically provided that the foreign born child of a United States citizen acquired citizenship at birth, once the relationship of the

appellant to the said Lew Wah Fook, his alleged father, and a recognized United States citizen, has been established by evidence of record, the appellant must be deemed to have acquired United States citizenship in accordance with the provisions of that statute. The claim to United States citizenship, having been established, the appellant is entitled to declaratory judgment of United States nationality.

Acheson v. Yee King Gee, 184 F. 2d 382;

Wong Gan Chee v. Acheson, 95 Fed. Supp. 816;

Toy Teung Kwong v. Acheson, 95 Fed. Supp. 745.

The appellant's uncontroverted, positive and affirmative evidence of record affords bare conjecture to the contrary. The appellant established the claimed relationship by a fair preponderance of the evidence.

The appellant identified himself, as did his witnesses, by direct and positive evidence as the lawful blood child of a recognized United States citizen who had resided in the United States. The lawful son of a recognized United States citizen is legally entitled to a declaratory judgment of United States citizenship. (8 U. S. C. A. 903.)

Conclusion.

It is therefore respectfully submitted that the findings of the Trial Court are "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure in that there was not a "scintilla" of evidence to warrant the Court in finding for the defendant-appellee. In concluding that Lew Wah Fook, the guar-

dian and alleged father of appellant, should have been advised that, in fact, a son was born to him and his wife rather than a daughter, as the name indicated, the Court committed prejudicial error. As the Trial Court chose to disregard the uncontradicted and unimpeached testimony of appellant, his guardian and his two older brothers and apparently indulged in conjecture, the judgment should be reversed and appellant declared to be a national and/or citizen of the United States and a lawful blood child of Lew Wah Fook.

Dated: Los Angeles, California, January 27, 1954.

Respectfully submitted,

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